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No. 207

Supreme Court of the United States.

OCTOBER TERM, 1905.

Robert Devine et al.,
Appellants,
vs.
The City of Los Angeles.
Appellee.

BRIEF FOR APPELLEE.

W. B. MATHEWS,
Solicitor for Appellee.

HENRY T. LEE,
J. R. SCOTT,
Of Counsel.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

INDEX.

Statement of the case 4

ARGUMENT.

I.

As the requisite diversity of citizenship does not exist here, the court has no jurisdiction of this suit unless it is one arising under the Constitution, laws or treaties of the United States; and this fact must be shown in the bill by a statement of facts in legal and logical form, such as is required in good pleading, and the jurisdiction of the Circuit Court must be made to appear from appellants' statement of their own case, and not from their statement of the nature of the appellee's claim .....27—30

II.

The bill is one to quiet title, and not to remove a cloud, and is brought under the California statute, which does not require the nature of defendant's claim to be shown; and hence the allegations concerning the nature of defendant's claim are surplusage and are not sufficient to raise a federal question .....30—42

III.

The question of the repugnancy of the acts of the legislature and of the charter of the city of Los Angeles to the Federal Constitution, on the ground that they

divest appellants of their property without due process of law and impair the obligation of the contract contained in the patents on which appellants base their titles, is one primarily for the state courts ..... 42—48

IV.

Section 1979 of the U. S. Revised Statutes has no application to this suit 48

V.

The controversy between appellants and the city of Los Angeles, presented by the bill, concerning the ownership of the waters of the Los Angeles river and the waters in the lands of the appellants, being based on grants emanating from the Spanish and Mexican governments, does not involve any queston of which federal courts have jurisdiction ..... 50—59

VI.

The Act of Congress of March 3, 1851, providing for the ascertainment and settlement of private land claims in the state of California, does not purport to apply to incorporeal rights, and, therefore, as the rights with regard to the waters mentioned in the bill are of that character, manifestly, the city was not required to present her claim therefor under this act; and there being no room for the construction of the act in this

respect, no real federal question is raised by the allegations of the bill, even if it were conpetent to anticipate the claim of appellee .....59—72

VII.

The rights of the city with respect to the waters mentioned in the bill are not an incorporeal hereditament based on grant or prescription, but are a natural easement, created by a general law, not constituting an interest in land, and, therefore, did not come within the purview of the Act of March 3, 1851, even if that Act could be held to apply to strict easements or servitudes.....73—76

VIII.

The disclaimer contained in the answer, of all rights purported to be granted to the city of Los Angeles by its charters, so far as such rights were ever vested in the appellants or their predecessors, removes the federal questions, if any existed under the allegations of the bill that such charters deprived appellants of their property without due process of law and impaired the obligation of the contract contained in the patents under which they derive title .....76—78

Supreme Court

OF THE

United States

October Term, 1905.

Robert Devine et al.,
Appellants,

vs.

The City of Los Angeles.
Appellee.

BRIEF FOR APPELLEE.

This is an appeal from a decree of the Circuit Court of the United States for the southern district of California dismissing a bill to remove alleged clouds from the title, and to quiet the title, of the appellants to certain lands, and the waters therein, situate in the county of Los Angeles, state of California.

STATEMENT OF THE CASE.

Appellants are 244 in number, and they own, in severalty, various tracts of land aggregating several thousand acres, located in the county of Los Angeles, state of California. Some of these lands are embraced in the Rancho San Rafael, some in the Rancho Los Felis, and some in the Rancho Providencia. The first named rancho was granted by the King of Spain, and the other two by the republic of Mexico, to the predecessors of the appellants. The titles to these ranchos were confirmed to the successors of the original grantees by the board of land commissioners, created by and acting under, the act of Congress approved March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California", and patents to these ranchos were thereupon issued by the United States to the confirmees. [Tr. fols. 30-33, p. 24-26.]

It is alleged in the bill, that these grants conveyed the title to the waters within the lands; that the successors of the grantees, at the date of the treaty of Guadalupe Hidalgo, held the lands by a fee-simple title, and that the United States, acting in pursuance of that treaty, confirmed such title and executed grants of such lands in fee-simple absolute to the predecessors of appellants. [Tr. fols. 33, 34, p. 26-27.]

It is further alleged in the bill, that the city of Los Angeles claims to be the successor in right

and title to all of the grants made by the Spanish and Mexican governments to the Pueblo Nuestra Senora Reina de Los Angeles, and that the city filed before the board of land commissioners a claim, in virtue of the general laws of Spain, to sixteen square leagues of land, alleging that said lands had been granted to the pueblo as common lands. [Tr. fols. 34-35, pp. 27, 28.] That the board of land commissioners confirmed the title of the city to four square leagues of the land so claimed, but rejected its claim to the remaining twelve square leagues, and that, a patent was issued by the United States to the city for the land so confirmed. That said patent did not refer to the Los Angeles river, or its waters, and that it did not convey, or purport to convey, any waters of said river. [Tr. fols. 35-36, p. 28.] That said city claims the paramount right to the waters of the Los Angeles river and the river itself by virtue of grants, laws, usages and customs of the Republic of Mexico and the Kingdom of Spain made and in vogue prior to the cession of the territory embraced within the state of California to the United States of America, under the treaty of Guadalupe Hidalgo, and by virtue of certain acts of the legislature of California, referred to in the bill, and especially by virtue of an act of the legislature passed April 4, 1850, incorporat-

ing the city of Los Angeles and declaring that it

> "shall succeed to all the rights, claims, and "powers of the Pueblo de Los Angeles in re- "gard to property, and shall be subject to all "the liabilities incurred, and obligations "created, by the ayuntamiento of said "pueblo." [Tr. fols. 35-8, pp. 28-9.]

The bill further alleges that the city never procured confirmation of, and is not the owner of, any rights in the waters of the Los Angeles river other than such as passed under said grant of land confirmed by said patent, and that said act of the legislature, passed April 4, 1850, and certain further acts of the legislature and certain proceedings, acts and charters of said city, set forth in the bill, are a cloud upon the title of the appellants to their lands. [Tr. fol. 38, pp. 29, 30.]

That the Los Angeles river runs through said Providencia, San Rafael and Los Felis ranchos and thence through the city of Los Angeles; that the lands of the appellants are riparian to the stream; that underlying the lands of the appellants are percolating waters which do not constitute a part of the Los Angeles river but which by reason of the patents referred to, and mesne conveyances, belong to the several appellants as owners of said lands. [Tr. fol. 38, p. 30.]

The bill further alleges that the city claims it is the owner of the river and its waters, and

of its tributaries and the waters therein, passing through the ranchos named, and of the percolating waters in the lands of the appellants; that it has the right to take and appropriate said waters to the extent of the needs of the city and its inhabitants, and that the appellants have no right to take any of the surface waters of the river or to pump any of the percolating waters in their lands for use thereon, except in subordination to the city's alleged paramount right to take and use the same; and the bill further alleges that the city threatens and intends to institute a suit in the state courts of California to enjoin the appellants from using any of the waters pumped by them from the wells on their lands. [Tr. fols. 39, 41; pp. 31, 32.] It is further alleged in the bill that the city rests its right and claim to said river and the waters thereof, and the waters in the lands of the appellants, first: upon a construction of the treaty of Guadalupe Hidalgo, and of said act of Congress of March 3, 1851, and, *second*, upon certain acts of the legislature and certain charters of the city of Los Angeles adopted and approved in pursuance of an erroneous construction of said treaty and of said act of Congress. [Tr. fols. 41, 42; p. 32.]

That said acts of the legislature and charters of said city are: *first*, an act, approved March 26, 1874, purporting to grant to the city, in ab-

solute ownership, all the waters in the river Los Angeles, from its sources to the southern boundary of the city; also the right to develop and use all waters flowing beneath the surface in the bed of said river between said points, excepting and reserving from said grant all vested private rights to the water flowing on or beneath the surface in the bed of said river; *second*, an act, approved April 1, 1876, purporting to grant the same rights in the same terms as contained in the act of March 26, 1874; *third*, an act approved March 30, 1878, purporting to grant to the city the Los Angeles river, with powers to control the development and distribution of the waters of the river, omitting, however, the exceptions contained in the prior acts in favor of vested private rights. That said charters are: *first*, the charter of the city of Los Angeles approved by the legislature January 31, 1889, of which section 190 provides that the city shall continue in the ownership and enjoyment of all rights to the water of the river heretofore vested in it and shall have the exclusive right to all the water flowing in the river at any point between its sources and the southern boundary of the city, and shall have the ownership and right to develop and use all waters flowing beneath the surface in the bed of the river between said points. [Tr. fols. 42-46, pp. 33-35.] *Second*, amendments to said charter approved January 30, 1903, and re-enacting the

provisions of section 190 above referred to and providing for the institution and organization of a "water department" for the management and control of all waters, water rights and water works belonging to the city. [Tr. fol. 46, p. 35.]

It is further alleged that under said acts and said charter the city has asserted and assumed the right to take physical control of the Los Angeles river and its tributaries and has exercised the right of obstructing ditches and other conduits maintained by owners of land in the valley of the river above said city and of preventing the use of the waters of the river for irrigating the lands of the appellants and that said laws and charters and the exercise of said rights have resulted in the destruction of the values of said lands. [Tr. fols. 46, 47; pp. 35, 36.]

And the bill further alleges that said acts of the legislature and said charters of the city of Los Angeles are in violation of the fourteenth amendment of the constitution of the United States in that they deprive, or attempt to deprive, the appellants of their property without due process of law and to grant the same to the city of Los Angeles; that said acts and said charters impair the obligation of the contracts expressed in the patents of the United States to the lands of the appellants; and that said acts of the legislature and said charters and the assertion and ex-

ercise by the city of the right to control said river and its waters are in violation of section 1979, title XXIV of the Revised Statutes of the United States, in that the city, under color of said acts and charters, has subjected the appellants to the deprivation of property rights, privileges and immunities secured to them by the constitution of the United States. [Tr. fols. 47-48, p. 36.]

And the bill further alleges that the construction of the act of Congress of March 3, 1851, upon which the defendant city rests its right and claim to said river and to said waters is contrary to justice and equity, and erroneous, that, according to a proper construction thereof, the city was required to present to the board of land commissioners its claim to the waters of the river for confirmation, and that according to a proper construction of said act the rights of appellants to the waters of the river as well as to the waters in their lands would be secured. [Tr. fol. 49, p. 37.]

And the bill further alleges that the claims of the city to said waters are without right; that the claims and threats of the city to institute actions against the appellants and the control which it has exercised over the river and the waters thereof, and the several acts of the legislature of California and the charter of said city purporting to confer title to said river and its waters upon said city as the successor to the Mexican pueblo, cast

a cloud upon the titles of the appellants to their lands, and have, in large measure, destroyed the market values thereof.

Wherefore appellants pray:

1. That a decree be granted appellants removing the cloud cast by the city of Los Angeles upon their titles to the lands described in the bill, that the acts of the legislature of the state of California, and the charters of the city be declared invalid in respect to conferring upon the city any rights in the waters of the Los Angeles river acquired from the pueblo of Los Angeles, other than such rights as were ascertained and confirmed under the act of March 3, 1851.

2. That a decree be granted to the appellants, and each of them quieting their several titles to their lands and to the waters therein, and to the riparian right of each of them to use the waters of said river, as against the paramount title claimed by said city to have been derived from Spain or Mexico, or claimed to have been derived from or to be supported by said acts of the legislature of the state of California, or by the charter of said city; and the appellants also prayed that it be decreed that the appellants and the city have each and severally such title only derived from Spain and Mexico as was confirmed and patented to them or their predecessors by the act of Congress of March 3, 1851.

3. That a decree be granted to the appellants forever enjoining the city of Los Angeles from setting up or asserting such paramount right and title to said waters; and further enjoining said city from asserting and exercising dominion or control over said river and said waters under or by virtue of said acts of the legislature, or said charter of said city of Los Angeles. [Tr. fols. 51-53, pp. 32-40.]

The portions of the answer to the bill, which are material to the questions before the court upon this appeal, are substantially to the following effect:

It is alleged in the answer that by the terms of each of the grants to the three ranchos named in the bill, and by the laws of the government making the same, all of the waters within any of the lands embraced in said ranchos, which formed a part of or found their way into the surface or subterranean stream of the Los Angeles river, were excepted and reserved in favor of the pueblo of Los Angeles and that none of said waters were confirmed or granted by the United States to the predecessors of the appellants. [Tr. fols. 61-65, pp. 44-47.]

It is admitted in the answer that the city claims to be, and it is alleged that the city is, in fact, the successor to all the rights and grants made by the Spanish and Mexican governments to the pueblo of Los Angeles. The answer denies that

no reference was made in the patent issued by the United States to the city of Los Angeles, or in the proceedings upon which it is based, to the waters of the Los Angeles river, either by express words, or by implication, but alleges that said patent did purport to grant to the mayor and council of the city of Los Angeles all appurtenances belonging to the land therein granted, including all the waters of the river and the right to the use of the same. [Tr. fols. 65-68, pp. 48, 49.]

It is admitted in the answer that the city claims the paramount right to the waters of the Los Angeles river, by virtue of grants, laws, usages and customs of the Republic of Mexico, and the Kingdom of Spain, and the act of the legislature, approved April 4, 1850, mentioned in the bill, but the answer denies that these are the only sources of title through which the city claims, and alleges that it also claims said paramount right, by virtue of long continued use and possession of said river, and the waters thereof, for the period of more than 120 years, and by various grants and conveyances from private individuals, and by virtue of various decrees of courts of competent jurisdiction, and of the patent to the mayor and common council of the city of Los Angeles, mentioned in the bill, and also by virtue of its ownership of various tracts of land, which are ripar-

ian to said river, amounting in area to more than 4000 acres, embracing the land through which the river flows in passing through the lands included in said patent. [Tr. fol. 68, pp. 49-50.]

The answer disclaims that the city acquired, under the act of the legislature, passed April 4, 1850, any right to the Los Angeles river, or the water thereof, or any other water or right, which was at the time of the passage of said act vested in the predecessors of the appellants, or any private individual or corporation. [Tr. fol. 69, p. 50.]

The answer denies that the acts of the legislature, or the proceedings or acts or charter of the city, referred to in the bill, constitute any cloud upon the titles of the appellants, but, on the contrary, it is alleged that none of the appellants had, at the time of the commencement of the suit, or have now, any right or interest in or to the waters of the Los Angeles river, save in subordination to the paramount right of the city to take and use all of the waters of said river, to the extent of the necessities of the city, or its inhabitants. [Tr. fols. 70-71, p. 51.]

The answer alleges that all of the waters underlying the lands of appellants form and constitute a part of the Los Angeles river, and would, if not intercepted, reach the surface stream of the river, at a point above the northern boundary of

the city, and it is denied in the answer that any of said waters belong to the several appellants, or that they, or any of them, have ever had any ownership of said waters, save in subordination to the paramount right of the city to take and use said waters, so far as it and its inhabitants might need the same. [Tr. fols. 71-73, p. 52.]

It is denied in the answer that in the petition of the mayor and common council of the city of Los Angeles to the board of land commissioners for confirmation of the pueblo lands, no claim was made to the waters of the Los Angeles river, and it is alleged that the board of land commissioners, in its finding and judgment confirming the claim of the city to the pueblo lands, also confirmed its claim to the rights with respect to the waters of the river, which were possessed by the pueblo; and it is admitted that the city of Los Angeles has in the past claimed and now claims to be the owner of all of the waters of said river, and of its tributaries, from its sources of supply to the southern boundary of the city, and also of all of the waters existing in the lands of the appellants and of the waters under said lands; and the answer alleges that all of the waters in the lands of the appellants do in fact constitute a stream or watercourse, and are part of the waters of the Los Angeles river, and it is admitted that the city claims that the appellants have not any right to

pump the waters in their lands, because such pumping might ultimately have the effect of reducing the supply in the surface and subterranean river, and it is denied that they are percolating waters, and the answer further admits that the city asserts and claims the right to take said waters and appropriate the same to its use, at any time when they are needed by the city, or its inhabitants, and that the city denies the right of the appellants to pump any of the waters in their lands, except in subordination to the paramount claim and right of the city and its inhabitants to take and use said waters; but it is denied in the answer that the city claims the right to enter on the lands of any of the appellants to take or use said waters, or any part thereof, without having first obtained the right so to do, by grant from, or condemnation against, said appellants. It is admitted that the city claims the right to prevent the appellants from using the waters in their lands when the city has need of the same, but it is denied that it claims the right to prevent appellants from using said waters by entering upon their lands or by using physicial force, and it is alleged that the city claims the right to prevent the use of said waters by appellants only in the manner prescribed by the laws of the state of California, and that the city intends to enforce its rights against the appellants by means of the suit

brought by it, as alleged in the bill, in the state court, against certain of the appellants, for the purpose of enjoining them from using the waters pumped by them from their lands, and by means of other legal process, and not by any unlawful acts or physical force. [Tr. fols. 74-77, pp. 53-55.]

It is admitted in the answer that the city rests its claim to the Los Angeles river and the waters thereof, including the waters in the lands of the appellants, in part upon the treaty of Guadalupe Hidalgo, according to the manifest meaning thereof, viz: that the rights of pueblos were intended to be protected by said treaty, as well as the rights of individuals; and it is admitted that the city rests its said claim in part upon the act of Congress of March 3, 1851, according to the manifest meaning thereof, viz: that the claims of pueblos, and of municipal corporations succeeding them, to lands granted by the Spanish and Mexican governments, were entitled to confirmation, and that the confirmation thereof had the effect of confirming all water rights which were appurtenant to said lands, and that said act did not require claims for property other than lands to be presented for confirmation. [Tr. fols. 77-78, pp. 55-56.]

It is denied in the answer that the city rests its claim to the Los Angeles river, and its waters, including the waters in the lands of the appel-

lants, upon the laws of the state of California, and the ordinances and charters of the city of Los Angeles, except to the extent that the same had the effect of vesting and continuing in the city and its predecessors, such rights with respect to the waters of the Los Angeles river, as were possessed by the pueblo at the time the pueblo was dissolved and the city was incorporated, by the act of April 4, 1850, and such rights with respect to the waters of the river as might have been vested in the state of California upon its admission to the Union. [Tr. fols. 79-80, pp. 56-57.]

The answer denies that the city ever claimed, and alleges that it expressly disclaims, that there was granted by said acts of the legislature, or by the city charter, to the mayor and common council of the city of Los Angeles any right to develop waters percolating under the bed of the Los Angeles river, or elsewhere, which at the time of the passage of said acts, or at the time of the adoption of said charter was vested in the appellants, or any of them, or in their predecessors, or in any private individual or corporation.

The answer denies that the legislative acts and the ordinances and charters mentioned in the bill were adopted because or in pursuance of any erroneous construction of the treaty of Guadalupe Hidalgo, or of the act of Congress of March 3, 1851, but alleges, that the same were adopted with the intention of asserting that the city of

Los Angeles was the owner of all the rights possessed by the pueblo of Los Angeles to the waters of the Los Angeles river, and not with the intention of depriving the appellants, or any of them, or any of their predecessors, or any other private individual or private corporation, of any right in respect to the waters of said river, and denies that by any of said acts of the legislature mentioned in the bill, or by the charter of the city or the amendments thereof, there was intended to be granted to the city any right with respect to the water, flowing in said river or beneath the surface of the bed thereof, which was then vested in the appellants, or any of them, or any of their predecessors, or any private individual or private corporation, or that by any of said acts it was intended to divest any private person or corporation of any vested private rights in said waters, or that any of said acts have ever been construed by any court in the state of California to so divest any such private vested rights, but on the contrary it is alleged in the answer that it has been determined by the Supreme Court of California that said acts did not have such effect. [Tr. fols 80-82, pp. 57-59.]

The answer denies that the city has ever interfered with the appellants in the use of the waters of the river or its tributaries, or the waters of said valley, except when such waters were lo-

cated on or in the lands of the city or on or in lands on which the city had acquired the right of entry to divert and use said waters, except when the city has interferred with such use by judgments of court obtained by due process of law. And denies that the city has ever assumed or asserted the right to take physical control of any waters on or in the lands of the appellants. The answer disclaims that the acts or charters referred to in the bill grant to the city the right to take physical control of property belonging to appellants.

The answer denies that the acts of the legislature and the ordinances and charters of the city of Los Angeles, mentioned in the bill, or any of them, are in violation of the fourteenth amendment to the constitution of the United States, or that any of said acts, ordinances or charters impair the obligation of the several contracts made through and by the patents of the United States to the predecessors of the appellants, or that any of the acts of the legislature including the acts, charters, and ordinances of the city of Los Angeles, mentioned in the bill, are in violation of section 1979, title XXIV, of the Revised Statutes of the United States, or that the city of Los Angeles, under color of any of said statutes or of the charter or ordinances mentioned in said bill, or otherwise, has subjected or caused to be subjected said appellants, or any of them, to the de-

privation or deprivations of property rights, privileges or immunities secured to them by the constitution or laws of the United States. [Tr. fols. 88-89, pp. 61-63.]

The answer denies that the sound and reasonable or proper construction of the act of March 3, 1851, will secure the appellants in any riparian rights to the waters of the Los Angeles river, or the waters within their land, but, on the contrary, the answer alleges that, according to the proper construction of said act, the confirmation and patent therein provided for only had the effect of confirming to the confirmee and patentee the lands therein described, but subject to all the easements and servitudes imposed thereon by the laws of Spain and Mexico in favor of third parties, including the rights to the waters of unnavigable streams which were attached to other lands, or belonged to pueblos, or private individuals other than the grantees. And where such water rights were appurtenant to lands granted by the Spanish and Mexican governments and confirmed and patented under said act of Congress, such water rights passed by such patents, and a claim for such water rights was not required by such act to be confirmed or patented. [Tr. fols. 89-93, pp. 63-66.]

It is admitted in the answer that the city claims that the appellants have no right to the waters of the Los Angeles river, including the waters in

other lands, as against the city and its inhabitants, when the city shall determine that it needs said waters, and that the city claims that the use by the appellants of such waters is at the sufferance of the city, and may be prohibited by the city at any time, and that the city is threatening to institute suits against the appellants for the purpose of enforcing such claims, but it is denied that any and all said claims or any dominion or control which the city has exercised over the river and the waters thereof has cast any cloud upon the several titles of appellants to their lands or affected the market value or saleability of such lands. [Tr. fols. 95-96, pp. 66, 67.]

It is alleged in the answer that in the year 1781 a pueblo was founded on the site of the present city of Los Angeles by the government of the kingdom of Spain and that, according to the laws and regulations of that country, said pueblo became entitled to the sole and exclusive right in perpetuity to the absolute ownership of all the waters of the Los Angeles river, whether flowing upon or beneath the surface of the ground; that said river then rose and now rises several miles above the site of the pueblo and ran and still runs down through said site to the lands now embraced within the city of Los Angeles; that during the whole of the occupation and control of said pueblo by the Spanish and Mexican governments the municipal authorities at all times

exercised control of and claimed the exclusive right to use all the waters of said river, and that right was during all of said time recognized and acknowledged by the owners of all of the lands bordering on said river, including the predecessors of the appellants; that ever since the occupation and control of said pueblo by the United States and by the state of California the municipal authorities of the city have exercised the same rights over and to the waters of the river as were previously exercised and claimed by the authorities of the pueblo, and that such control and rights were exercised and claimed for the purpose of irrigation and for the domestic and other uses of said pueblo and said city and the inhabitants thereof.

It is further alleged in the answer that within one year after the foundation of the pueblo the municipal authorities thereof constructed a system of irrigation works and conveyed the waters of the river to and upon lands in the pueblo and that thereafter from time to time other lands of the pueblo were brought under irrigation so that all of said waters were diverted from said river and used for such irrigation during a period of many years prior to the conquest of California by the United States, and that, from and after such conquest the same use was made of the waters of the river for the irrigation of lands within the

pueblo and for domestic use of its inhabitants up to the time of the passage of the act of April 4, 1850, incorporating the city of Los Angeles; that from and after that time the municipal authorities of said city continued to construct additional works for the more economical diversion and distribution of such waters for use in irrigating lands within said city, and for domestic use of the inhabitants thereof; that within the past 18 years nearly all of said irrigable lands have been divided into building lots and covered with houses, so that all of the waters previously used for the irrigation of said lands excepting the portion thereof which has been diverted by the appellants within the last five years, have been used by the city and its inhabitants for purposes other than for irrigation, and all of the waters of said river during the dry season of each year, extending from the first day of May to the first day of November, and a great portion of said waters during the rest of the year have been needed for said uses. That the population of said city is not less than 180,000 people and is increasing at the rate of more than 10,000 per year, and that the city has no other source of water supply except said river. [Tr. fols. 103, 106, pp. 72-74.]

It is alleged in the answer that, with certain exceptions referred to therein, the pueblo of Los Angeles, from the time of its foundation in the year 1781, up to the incorporation of the pueblo

as a city by the act of 1850, and the said city from that time until now has continuously, exclusively and adversely to the whole world used all of the waters of the Los Angeles river under a claim of ownership of said waters, the exceptions referred to being claims made by certain persons at various times of rights to the use of the waters of the river and of affluents thereof which have been litigated and decided by the state courts in favor of the city, and it is further alleged that within the past twelve years certain owners of lands in which flowed underground waters of the river have set up a claim that said waters were not a part of the river and that they were entitled to take and appropriate said underground waters for their own use, and that, in pursuance of such claims, great numbers of said parties, including some of the appellants have constructed wells and engaged in pumping large quantities of said water, thereby diminishing the surface flow of the river, and that it is for the purpose of preventing such diminution that the city is bringing and contemplates bringing the actions against appellants which are referred to in the bill; that within the past five years such abstraction of these underground waters did not interfere with the supply of water required by the city, but within the past three years the amount of diversion by means of said wells has increased so much and the needs of the city and its inhabitants have also

so greatly increased that the waters of the river which reached the surface stream thereof and the underground diversion works of the city have not been sufficient to supply it and its inhabitants with the water needed by them. [Tr. fols. 106-110, pp. 74-76.]

It is alleged in the answer that the city in its corporate name or in the name of the board of water commissioners is the owner of numerous tracts of land which are riparian to the river, and which are particularly described in the answer. [Tr. fols. 110-112, pp. 76-78.] It is alleged in the answer that in the year 1879, two actions were commenced by predecessors of some of the appellants against the city of Los Angeles claiming the right to divert and use waters of the river and both of said actions were finally determined by the Supreme Court of the state of California against the plaintiffs and in favor of the city, and it is alleged that appellants who are successors in interests of the plaintiffs in the suits last mentioned are by said judgments estopped to deny that the city is the owner of a paramount right to use so much of the waters of the Los Angeles river as it and its inhabitants may need. [Tr. fols. 112-125, pp. 78-87.]

Thereafter, the city of Los Angeles, by its counsel, moved the court to dismiss this cause on the ground that it appeared from the bill of com-

plaint and the answer thereto that the court had no jurisdiction of said cause. And on the hearing of said motion it was by the court adjudged and decreed that the bill of complaint herein be dismissed for want of jurisdiction. From this decree the appellants have appealed to this court.

ARGUMENT.

As the requisite diversity of citizenship does not exist, the court has no jurisdiction of this suit unless it is one arising under the constitution, laws or treaties of the United States:

> "* * * the circuit courts of the United "States shall have original cognizance, con- "current with the courts of the several states, "of all suits of a civil nature * * * aris- "ing under the constitution or laws of the "United States, or treaties made, or which "shall be made under their authority." [25 St. at L. 433, cap. 866.]

The rule has been repeatedly laid down by this court that a case may be said to arise under the constitution, a law or a treaty of the United States, whenever its correct decision depends upon the construction of the constitution or of such law or treaty.

Cohens v. Virginia, 6 Wheat. 379;

Osborne v. Bank of the United States, 9 Wheat. 822;

Tennessee v. Davis, 100 U. S. 264.

In the case of Bankers Casualty Co. v. Minn. St. P. &c. Ry., 192 U. S. 371, 381, the court said:

> "But it is contended that jurisdiction also "rested on the ground that the case arose un- "der the constitution or laws of the United "States, and that must be tested by the set- "tled rule that a suit does not so arise unless "it really and substantially involves a dis- "pute or controversy as to the effect or con- "struction of the constitution or some law or "treaty of the United States, upon the de- "termination of which the result depends."
>
> (Citing cases.)
>
> See also City of New Orleans v. Benjamin, 153 U. S. 411.

We submit that the bill does not present an actual and substantial controversy as to the effect or construction of the constitution, or of any law or treaty of the United States, on the determination of which the recovery depends, and, therefore, does not make a case within the jurisdiction of a Federal court.

The bill must disclose a federal question by a statement of facts in legal and logical form, such as is required in good pleading.

A mere general allegation that the suit is one arising under the constitution and laws of the United States is not sufficient to confer jurisdic-

tion. The jurisdictional allegations must be specific. As was said by Chief Justice Waite, writing the opinion in the case of Gold Washing and W. Co. v. Keyes, 96 U. S. 199, 201:

> "It is well settled that in the courts of the "United States the special facts necessary "for jurisdiction must, in some form, appear "in the record. * * * Before, therefore, "a circuit court can be required to retain a "cause under their jurisdiction, it must, in "some form, appear upon the record, by a "statement of facts, 'in legal and logical "form', such as is required in good plead- "ing (1 Chit., Pl. 213), that the suit is one "which 'really and substantially involves a "dispute or controversy' as to a right which "depends upon the construction or effect of "the constitution, or some law or treaty of "the United States."

Speaking of its appellate jurisdiction, this court said, in the case of City of Lampasas v. Bell, 180 U. S. 276, 282:

> "This court has only jurisdiction by ap- "peal or writ of error directly from the cir- "cuit court in certain cases, one of which is "when the constitution or law of a 'state is " 'claimed to be in contravention of the con- " 'stitution of the United States.' Sec. 5 of "the Judiciary Act of 1891, 26 Stat. at L. "828, Chap. 517. But the claim must be real "and substantial. A mere claim in words is "not enough. We said by the Chief Justice "in Western U. Teleg. Co. v. Ann Arbor R. "Co., 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. "Ct. Rep. 867: 'When a suit does not really " 'and substantially involve a dispute or con-

" 'troversy as to the effect or construction of
" 'the constitution or laws of the United
" 'States, upon the determination of which
" 'the result depends, it is not a suit arising
" 'under the constitution or laws. And it
" 'must appear on the record, by a statement
" 'in legal and logical form, such as is re-
" 'quired in good pleading, that the suit is
" 'one which does really and substantially
" 'involve a dispute or controversy as to a
" 'right which depends on the construction
" 'of the constitution or some law or treaty
" 'of the United States, before jurisdiction
" 'can be maintained on this ground.' " (Citing cases.)

We will now proceed to consider the question whether the bill, by proper allegations, makes a case within the jurisdiction of the Circuit Court

The jurisdiction of the court must be made to appear from complainants' statement of their own claim, and not from their statement of the nature of the defendant's claim.

While the appellants, in the prayer of the bill, ask for a decree quieting their title to the lands described in the bill, it is evident that they did not intend by their pleading to state a cause of action to quiet title under the old chancery practice, under which, as stated in Boston &c. Mining Co. v. Montana Ore Co., 188 U. S. 632:

"There are two distinct kinds or classes of "bills, of peace, or bills to quiet title, the one "brought for the purpose of establishing a "general right between a single party and "numerous persons claiming distinct and in-"dividual interests; the other for the purpose "of quieting complainant's title to land "against a single adverse claimant. In the "second class the suit can be maintained by "a party in possession against a single de-"fendant ineffectually seeking to establish "a legal title by repeated actions of eject-"ment, and in such case it is necessary to "aver that the title of complainant has been "established by at least one successful trial "at law before equity will entertain juris-"diction. 3 Pom. Eq. Jur. 2d ed. sec. 1394, "note 3, and 1 Pom. Eq. Jur. sec. 246."

It is apparent that this bill does not come under either of these classes, but was intended to be framed under the statute of the state of California, which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." (Section 738, Code of Civil Procedure.) This statute is similar to statutes in many other states, upon the same subject, and it has the effect of enlarging the ancient jurisdiction of courts of equity in respect to suits to quiet title. Wehrman v. Conklin, 155 U. S. 314, 325. These enlarged equitable rights are administered in Federal courts, so far as they do not conflict

with any provision of the constitution or with the statutes of the United States.

> "Whilst it is true that alterations in the "jurisdiction of the state courts cannot af- "fect the equitable jurisdiction of the Cir- "cuit Courts of the United States so long as "the equitable rights themselves remain, yet "an enlargement of equitable rights may be "administered by the Circuit Courts as well "as by the courts of the state."

Broderick's Will, 21 Wall. 503;
Holland v. Challen, 110 U. S. 15, 26;
United States v. Wilson, 118 U. S. 86;
Frost v. Spitley, 110 U. S. 557.

Section 738 of the Code of Civil Procedure of California, was copied from the old Practice Act of that state (Laws of California, 1851, pp. 92, 93) in reference to which the Supreme Court of California, in the case of Head v. Fordyce, 17 Cal. 151, said:

> "The act was intended to embrace every "description of claim whereby the plaintiff "might be deprived of the property, or its "title clouded, or its value depreciated, or "whereby the plaintiff might be incommoded "or damnified by the assertion of an out- "standing title, already held, or to grow out "of the adverse pretension."

It is, therefore, held by the Supreme Court of California, that

> "In an action under section 738 of the "Code of Civil Procedure, it is not necessary

"to allege in the complaint the nature of the "estate or interest claimed by the defend- "ant."

People v. Center, 66 Cal. 551, 562.

To the same effect

Castro v. Barry, 79 Cal. 443.

"The only purpose of the averment of an "adverse claim is to notify the defendant of "the nature of the action, and that he is re- "quired to set forth and allege any adverse "title he may claim to have, or to disclaim "any such adverse title, either expressly, or "by default."

Mining Co. v. Mining Co., 83 Cal. 589, 609.

We submit, therefore, that the allegations of the bill, that the adverse claims of the city to the waters of the Los Angeles river, and the waters in the lands of the complainants, are based upon an erroneous construction of the treaty of Guadalupe Hidalgo, the provisions of the act of March 3, 1851, and certain acts of the legislature of the state of California, and ordinances and charters of the city of Los Angeles, mentioned in the bill, are unnecessary to a statement of appellants' case in a suit to quiet title to such property under the enlarged equitable jurisdiction of the Circuit Court. These allegations are plainly intended to raise a Federal question where none would otherwise appear, and they are, therefore, improper under the rule, declared in the following de-

cisions, that the jurisdiction of the court must be made to appear from the plaintiff's statement of his own claim, and not from his statement or anticipation of the nature of the defendant's claim.

"Even under the act of 1875, the jurisdic-
"tion of the Circuit Court of the United
"States could not be sustained over a suit
"originally brought in that court, upon the
"ground that the suit was one arising under
"the constitution, laws or treaties of the
"United States, unless that appeared in the
"plaintiff's statement of his own claim. This
"was distinctly adjudged, and the reasons
"clearly stated, in Metcalf v. Watertown,
"128 U. S. 586, 589." * * *

"* * * the only reference to the consti-
"tution or laws of the United States is the
"suggestion that the defendants will contend
"that the law of the state under which the
"plaintiff's claim, is void, because in contra-
"vention of the constitution of the United
"States; and by the settled law of this court,
"as appears from the decisions above cited,
"a suggestion of one party that the other
"will or may set up a claim under the con-
"stitution or laws of the United States, does
"not make the suit one arising under that
"constitution or those laws."

Tennessee v. Union and Planters Bank, 152 U. S. 454.

"It would be wholly unnecessary and im-
"proper in order to prove complainant's
"cause of action to go into any matters of
"defense which the defendants might pos-
"sibly set up, and then attempt to reply to
"such defense, and thus, if possible, to show

"that a Federal question might or probably "would arise in the course of the trial of the "case. To allege such defense and then "make an answer to it before the defendant "has the opportunity to itself plead or prove "its own defense is inconsistent with any "known rule of pleading, so far as we are "aware, and is improper.

"The rule is a reasonable and just one that "the complainant in the first instance shall "be confined to a statement of its cause of "action, leaving the defendant to set up in "his answer what his defense is * * *"

* * * * * * * * * * * *

"The cases hold that to give the Circuit "Court jurisdiction the Federal question "must appear necessarily, in the statement of "the plaintiff's cause of action, and not as "mere allegations of the defense which the "defendants intend to set up or which they "rely upon. Third Street Railway Com-"pany v. Lewis, 173 U. S. 457."

Boston &c. Mining Co. v. Montana Ore Co., 188 U. S. 632.

"Hence, it has been settled that a case can-"not be removed from a state court into the "Circuit Court of the United States on the "sole ground that it is one arising under the "constitution, laws or treaties of the United "States, unless that appears by plaintiff's "statement of his own claim; and if it does "not so appear, the want of it cannot be sup-"plied by any statement of the petition for "removal or in the subsequent pleadings. "And moreover that jurisdiction is not con-"ferred by allegations that defendant intends "to assert a defense based on the constitu-"tion or a law or treaty of the United States,

"or under statutes of the United States, or "of a state, in conflict with the constitution. "Tennessee v. Union & Planters Bank, 152 "U. S. 454; Chappell v. Waterworth, 155 U. "S. 102; Walker v. Collins, 167 U. S. 57; "Sawyer v. Kockersperger, 170 U. S. 303; "Florida Central & Peninsular Railroad v. "Bell, 176 U. S. 321."

Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 188.

"It has been several times held by this "court that the plaintiff, if the statement of "his own claim does not disclose a Federal "question, cannot create jurisdiction in a "Circuit Court by anticipating the defend- "ant's claim, and by alleging that the de- "fendant will set up a defense under some "law of the United States."

Florida Central &c. Railroad v. Bell, 176 U. S. 321.

While the suit set up in the bill is, as we view it, merely one to quiet the title of the appellants against the adverse claims of the city of Los Angeles, and is cognizable only in the state courts, yet appellants have endeavored to give the case a federal aspect for the purposes of jurisdiction by alleging that the claims of the city to the waters of the river and in their lands are made under the treaty of Guadalupe Hidalgo, the act of Congress of March 3, 1851, the acts of the legislature and the charters of the city, described in the bill, and that * * * "said claims of the

said city to the exclusive paramount title of the waters, * * * and the threat it is making to institute action against your orators, and the dominion and physical control which it has exercised over the said river and the waters thereof, * * * * and the said several acts of said legislature of California, and the said charters of defendant, purporting to confer upon said defendant the title of said river and its waters and declaring and asserting that such title to said river and its waters is vested in said defendant as successor to the Mexican pueblo have, and do, cast a cloud upon the several titles of your orators to the said lands." [Tr. fols. 50, 51, p. 38.]

And, in the prayer of the bill the appellants ask that a decree be granted: "* * * removing "cloud cast by the said defendant City of Los An- "geles upon the titles of your orators to their "lands above described, as hereinbefore alleged, "and that the acts of the legislature of the state of "California and the charters of said defendant "city herein set forth be decreed and declared in- "valid in respect of conferring upon said defend- "ant city any rights to or interest in the waters "of the Los Angeles river acquired by the pueblo "of Los Angeles under the laws, usages or cus- "toms of Mexico or Spain other than such as "have been ascertained and confirmed under the "act of Congress of March 3, 1851." [Tr. fol. 52, p. 39.]

We submit that the bill discloses an entire misconception, on the part of the appellants, of the nature and purpose of a suit to remove a cloud, in two particulars; *first*, such a suit is aimed at an instrument or record and not at mere threats, claims, or pretensions, and, *second*, it is not available for the purpose of having a statute canceled, or adjudged to be void.

The Supreme Court of California, in Castro v. Barry, 79 Cal. 443, 446, speaking of this remedy, says:

> "Suits to have an instrument canceled or "adjudged to be void were quite common in "the old chancery practice, and constituted "one of the applications of the principle *quia* "*timet*. (2 Story's Eq. Jur., Sec. 701.) This "suit is preserved by the Civil Code which "has the following provisions on the subject:
>
> "'Sec. 3412. A written instrument, in re-"'spect to which there is a reasonable appre-"'hension that, if left outstanding, it may "'cause serious injury to a person against "'whom it is void or voidable, may, upon his "'application, be so adjudged and ordered "'to be delivered up or canceled.
>
> "'Sec. 3413. An instrument, the invalid-"'ity of which is apparent upon its face, or "'upon the face of another instrument which "'is necessary to the use of the former in "'evidence, is not to be deemed capable of "'causing injury, within the provisions of "'the last section.'"

And, in the case last cited, the court, referring to a suit to remove a cloud and a suit to quiet title, says:

"In the former case the proceeding is "aimed at a particular instrument, or piece "of evidence, which is dangerous to the "plaintiff's rights, and which may be or- "dered to be destroyed in whosesoever hands "it may happen to be. While in the latter, "the proceeding is for the purpose of stop- "ping the mouth of a person who has assert- "ed or is asserting a claim to the plaintiff's "property, whether such claim be founded "upon evidence or utterly baseless. It is not "aimed at a particular piece of evidence, but "at the pretensions of an individual."

"A bill will not lie to remove a mere verbal "claim or oral assertion of ownership in "property as a cloud upon the title. Such "clouds upon title as may be removed by "courts of equity are instruments or other "proceedings in writing which appear upon "the records, and thereby cast doubt upon "the validity of the record title."

Parker v. Shannon, 121 Ill. 452.

To Mr. Justice Field is generally attributed the credit of accurately defining the true test for determining whether an instrument casts a cloud upon title. In the case of Pixley v. Huggins, 15 Cal. 127, 133, he said:

"The true test * * * is this: Would "the owner of the property, in an action of "ejectment brought by the adverse party, "founded upon the deed, be required to offer "evidence to defeat recovery. If such proof "would be necessary the cloud would exist; "if the proof would be unnecessary no shade "would be cast by the presence of the deed. "If the action would fall of its own weight,

"without proof in rebuttal, no occasion could "arise for the equitable interposition of the "court; as in the case of a deed void upon its "face, or which was the result of proceed- "ings void upon their face, requiring no ex- "trinsic evidence to disclose their illegality. "* * * So too, a conveyance not falling "in the chain of title, as from one who never "had any connection with the property, "would not constitute a cloud upon such title. "No action could be supported upon such a "conveyance, even in the absence of rebut- "ting proof, any more than upon so much "waste paper."

In the opinion the following language of Chancellor Walworth in Van Doren v. the Mayor, etc. of N. Y., 3 Paige 338, is quoted with approval:

"That can never be considered a legal "cloud, which cannot for a moment obstruct "the unaided rays of legal science, when they "are brought to bear upon the supposed ob- "scurity."

It is a necessary corrollary of this rule that a suit to remove a cloud is not available for the purpose of raising the question of the constitutionality of a statute, or of having an unconstitutional statute adjudged to be void.

The case of Burr v. Hunt, 18 Cal. 303, was a suit to enjoin a sale of plaintiff's property for taxes. The constitutionality of an act of the legislature, purporting to validate the assessment under which the sale was threatened,

was questioned; but the court held such a question could not arise in a suit to enjoin a tax sale on the ground that such sale would create a cloud upon the plaintiff's title, saying:

> "If the act of 1859 be unconstitutional, it "creates no cloud upon the title; if it be not "and the act embraces and validates this al-"leged assessment of 1857, then there is no "pretense for an injunction."

With reference to a bill to restrain the collection of a tax on ground of its illegality, Mr. Justice Hunt, in the case of Hannewinkle v. Georgetown, 84 U. S. 547, 548, said:

> "It has long been held also, that there "exists no cloud upon the title which jus-'tifies the interference of a court of equity, "where the proceedings are void upon their "face, that is, the same record which must be "introduced to establish the title claimed, "will show that there is no title."

It is manifest that, by the force of the terms used, a statute, which is alleged to be unconstitutional, cannot, at the same time, be alleged to constitute a cloud upon a title. If it is unconstitutional, it is a nullity. "An unconstitutional law is void and is no law." Siebold's case, 100 U. S. 376.

This is a general rule of equity in suits to remove a cloud on a title and it is embodied in sections 3412 and 3413, of the Civil Code of California, which provide substantially that where an

instrument is void on its face or upon the face of another instrument which is necessary to the use of the former in evidence, it is not to be deemed capable of creating a cloud.

In Williams v. Corcoran, 46 Cal. 553, it was held that where a statute, under which a tax was levied, was in violation of the state constitution, a deed, based on a sale made for such taxes, would be void on its face, and would, therefore, not constitute a cloud on a title.

So in this case, the statutes and charters which are declared in the bill to be obnoxious to the constitution of the United States, if they are subject to that objection, are void on their face, and therefore do not constitute a cloud on the title of appellant.

The question of the repugnancy of the acts of the legislature and the charters of the city to the Federal Constitution is primarily for the state courts.

According to the allegations of the bill, the titles of the appellants to their property were derived from Spain and Mexico, by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners. The state of California, therefore, is not in the line of such titles, so that the acts of the legislature, and the charters of the city, complained of, manifestly do not have the effect of depriving ap-

pellants of their property, or, as pointed out above, of even clouding their titles. Neither they, nor their predecessors, are named in any of those acts or charters, and the language employed therein does not disclose any purpose to take the rights of third persons in the Los Angeles river and confer them upon the city. The most that can be said of those acts and charters is that the state, dealing with its creature, the city, has conferred upon it such rights in respect to the waters of the river as at the time of their adoption, may have been vested in the state. Hence, we contend that the question of the repugnancy of these acts or charters to the impairment clause or the deprivation clause of the constitution, does not actually or necessarily arise under the allegations of the bill.

> "The judicial power extends to all cases in "law or equity, arising under the constitu- "tion, but these are cases actually, and not "potentially, arising, and jurisdicton cannot "be assumed on mere hypothesis."
>
> New Orleans v. Benjamin, 153 U. S. 411, 424.

> "The proposition is wholly untenable that, "before the state courts in which a case "properly pending can proceed to adjudica- "tion in the regular and orderly administra- "tion of justice, the courts of the United "States can be called on to interpose on the "ground that the state courts might so de-

"cide as to render their final action uncon-
"stitutional.

"Moreover the state courts are perfectly
"competent to decide Federal questions aris-
"ing before them and it is their duty to do so.
"Robb v. Connolly, 111 U. S. 624, 637; Mis-
"souri Pacific Railway Co. v. Fitzgerald,
"160 U. S. 556, 583.

"And, we repeat, the presumption is in
"all cases that the state courts will do what
"the constitution and laws of the United
"States require. Chicago & Alton Railroad
"v. Wiggins Ferry Co., 108 U. S. 18;
"Shreveport v. Cole, 129 U. S. 36; Neal v.
"Delaware, 103 U. S. 370, 389; New Or-
"leans v. Benjamin, 153 U. S. 411, 424.

"If error supervenes the remedy is found
"in section 709 of the Revised Statutes.

"The present case strikingly illustrates the
"applicability of these well-settled principles.
"The principal injunction was dissolved by
"the court by which it was granted, and the
"city's suit was dismissed by the highest
"judicial tribunal of the state.

"We regard this bill as an attempt to
"evade the discrimination between suits be-
"tween citizens of the same state and suits
"between citizens of different states, estab-
"lished by the constitution and laws of the
"United States, by bringing into the Circuit
"Court controversies between citizens of the
"same state, an evasion which it has been the
"constant effort of Congress and of this
"court to prevent, Bernards Township v.
"Stebbins, 109 U. S. 341, 353; Shreveport v.
"Cole, 129 U. S. 36, 44; and are of opinion

"that it should have been dismissed for want "of jurisdiction."

Defiance Water Co. v. Defiance, 191 U. S. 184, 193.

In this connection we take the liberty of saying that the city of Los Angeles never has claimed that any of such acts of the legislature or charters divested the appellants, or their predecessors, or any other riparian owners on the Los Angeles river, of any right which they may have had to the waters of that stream, and the Supreme Court of California has never decided that such acts or charters had that effect. On the contrary, that court, in the case of Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 253, referring to the acts of the legislature and the provisions of the charters of the city, relating to the rights and powers of the city in respect to the waters of the river, held:

"It will hardly be claimed that the legisla- "ture could grant to the city the water of the "river so as to deprive riparian owners of "it."

The case of Hooker v. Los Angeles, 188 U. S. 314, was a suit brought by the city to condemn a tract of land riparian to the Los Angeles river, and embraced in one of the ranchos described in this bill. It originated in the Superior Court of the county of Los Angeles, state of California,

under the title of City of Los Angeles v. Pomeroy, was appealed to the Supreme Court of that state, and came to this court on writ of error. It involved the question of the respective rights of the city and of the defendants therein, to the waters of the Los Angeles river. The acts of the legislature, referred to in the bill, were admitted in evidence at the trial, for the purpose of showing the succession of the city of Los Angeles to the property rights of the pueblo of Los Angeles. On the appeal to the Supreme Court of California, that court said:

> "No act of the legislature * * * can "diminish or change the rights of the defend- "ants in these lands derived from their "predecessors, the Mexican and Spanish "grantees."
>
> City of Los Angeles v. Pomeroy, 124 Cal. 597, 637.

On page 638, *et seq.*, of the same report, the Supreme Court of California declared:

> "The defendants hold their lands as suc- "cessors to several Spanish and Mexican "grantees, under patents from the United "States based upon the original grants. They "claim that, even conceding the rights of the "pueblo and the city's succession to those "rights (a concession which they make only "for the purposes of the argument on this "point), they are still, by virtue of their "ownership of the lands in question, entitled "to the exercise of full riparian rights, ex- "cept so far, and so far only, as those rights

"are impaired by the paramount rights of the "pueblo as they existed before the change of "flag and without any legislative additions "thereto.

"This claim, we think, is clearly just. The "legislature of California could grant noth- "ing to the city of Los Angeles which be- "longed to others, and the rights of the city, "as successor to the pueblo, in the lands of "riparian proprietors holding under Mexi- "can and Spanish grants, cannot exceed the "rights of the pueblo itself."

On writ of error this court held in reference to the acts of the legislature in question, as follows:

"And so as to certain statutes of the state "of California, which declare that the city "of Los Angeles is vested with the para- "mount right to the surface and subterra- "nean water of the Los Angeles river. Those "statutes were admitted in evidence mere- "ly to show that the city was the successor "of the ancient pueblo. The court held that "the right of the city of Los Angeles to take "from the Los Angeles river all of the wa- "ters of the river to the extent of its reason- "able domestic and municipal needs was "based on the Spanish and Mexican law, "and not on the charters of the city of Los "Angeles. The validity of the statutes, on "account of repugnancy to the Federal con- "stitution was not drawn in question in the "trial court nor in the Supreme Court of the "state, and both courts held that they neither

"granted to the city nor took away from "plaintiffs in error any rights or property."

Hooker v. Los Angeles, 188 U. S. 314, 319.

Under these circumstances, we submit that there is no possible excuse for the attempt of the appellants to drag into a Federal court the question of the repugnancy of the acts of the legislature, or the charters of the city, to the deprivation clause, or to the impairment clause, of the constitution of the United States. Not only may the presumption be indulged in this case that, if such question be submitted to the state tribunals, "they "will do what the constitution and laws of the "United States require," but the decisions of the highest court of California in the cases above cited affords positive assurance of that fact.

Section 1979, Title XXIV, Revised Statutes of the United States, has no application to suits of this nature.

This court, in the case of Holt v. Indiana Manufacturing Company, 176 U. S. 68, speaking of the sixteenth clause of section 629, the twelfth clause of section 563, and section 1979, of the Revised Statutes of the United States, said:

"All these provisions were brought for- "ward from the act of April 20, 1871, en- "titled 'An act to enforce the provisions of " 'the Fourteenth Amendment to the Consti-

"'tution of the United States, and for other "'purposes.' 17 Stat. 13, c. 22.

"Assuming that they are still in force, it "is sufficient to say that they refer to civil "rights only and are inapplicable here.

"If state legislation impairs the obligation "of a contract, or deprives of property with- "out due process of law, or denies them the "equal protection of the laws, as asserted by "counsel in respect of the statutes of Indiana, "remedies are found in the first section of "the act of August 13, 1888, 25 Stat. 433, c. "866, giving to the Circuit Court jurisdic- "tion of all cases arising under the constitu- "tion and laws of the United States; and in "sec. 709 of the Revised Statutes, which "gives a review on writ of error to the judg- "ments of the state courts whenever they "sustain the validity of a state statute or of "an authority exercised under a state, al- "leged to be repugnant to the constitution or "laws of the United States. Carter v. Green- "how, 114 U. S. 317; Pleasants v. Green- "how, 114 U. S. 325."

We believe that no further citation of authority is necessary upon the point, that section 1979, Revised Statutes, does not authorize any proceeding for the redress of the violation of rights protected by the impairment clause, or the deprivation of property clause of the constitution; and, if any federal question at all arises in this case, which we deny, it must be one arising under one or the other of these clauses.

The controversy between the city and the appellants, presented by the bill, concerning the ownership of the waters of the Los Angeles river and the waters in the lands of the appellants, does not involve any question of which Federal Courts have jurisdiction.

The bill shows that the appellants deraign title to their lands from grantees of the Spanish and Mexican governments, under grants confirmed to the successors of the original grantees by the board of land commissioners appointed under the act of Congress of 1851; nd the bill alleges that, as owners of such lands, the appellants are also owners of all of the waters existing therein. It is further shown in the bill that the city of Los Angeles claims to be the successor of the pueblo of Los Angeles, and to be the owner of the paramount right to the use of all of the waters of the Los Angeles river, including the waters in the lands of the appellants, so far as the same may be needed from time to time for the purpose of supplying the city and its inhabitants, under and by virtue of the laws of Spain and Mexico, the treaty of Guadalupe Hidalgo, the act of Congress of March 3, 1851, and certain acts of the legislature of the state of California and the charter of the city.

It thus appears that the title of the appellants, which they seek by the bill to have quieted and

cleared of clouds, is derived from Spanish and Mexican grants, made prior to the conquest of the territory of California, and subsequently confirmed by the United States. So that questions as to the nature and extent of the title or rights of the appellants in these lands, and whatever appertained thereto, are questions of state or local law, cognizable only in the state courts.

That the laws of California under Spanish and Mexican rule remained in force after the conquest, as part of the law of the state, is well settled by the decisions of this court.

> "The laws of a conquered or ceded coun-
> "try remain in force until altered by the new
> "sovereign".
>
> Mitchell v. United States, 9 Pet. 711, 749.

> "A cession of territory is never under-
> "stood to be a cession of the property be-
> "longing to its inhabitants. The king cedes
> "that only which belonged to him. Lands he
> "had previously granted were not his to
> "cede. Neither party could so understand
> "the cession."
>
> United States v. Percheman, 7 Pet. 51, 87.

> "As a matter of course, all laws, ordi-
> "nances, and regulations in conflict with the
> "political character, institutions, and con-
> "stitution of the new government are at once
> "displaced. Thus upon a cession of political
> "jurisdiction and legislative power—and the
> "latter is involved in the former—to the

"United States, the laws of the country in "support of an established religion, or "abridging the freedom of the press, or au-"thorizing cruel and unusual punishments, "and the like, would at once cease to be of "obligatory force without any declaration "to that effect; and the laws of the country "on other subjects would necessarily be "superseded by existing laws of the new "government upon the same matters. But "with respect to other laws affecting the pos-"session, use and transfer of property, and "designed to secure good order and peace in "the community, and promote its health and "prosperity, which are strictly of a munici-"pal character, the rule is general that a "change of government leaves them in force "until, by direct action of the new govern-"ment they are altered or repealed (Ameri-"can Insurance Co. v. Canter, 1 Pet. 542; "Halleck, International Law, ch. 34, sec. "14."

Chicago & Pacific Railway Co. v. McGlinn, 114 U. S., 542, 546.

The conquest of the territory of California did not, therefore, affect any vested interests in lands derived from the Mexican government, and the treaty of Guadalupe Hidalgo, did not impair such rights. On the contrary the United States, by that treaty, acknowledged and assumed the duty, imposed by the principles of general public law, of confirming the titles to lands which had been granted away by the Spanish or Mexican governments.

As was said by this court in the case of Langdeau v. Hanes, 21 Wall. 521, 527, referring to the cession by Virginia to the United States of its title to lands in the Northwest Territory:

> "It was for the confirmation of existing "possessions and titles, that the deed of ces- "sion stipulated, not the transfer of any new "title .* * * In this respect, she" (Vir- "ginia) "recognized the general rule of pub- "lic law, that by the cession of territory from "one state to another, public property and "sovereignty alone pass, and that private "property is not affected. * * * The "United States took therefore, the territory "ceded by Virginia bound by the established "principles of public law, to respect and pro- "tect all private rights of property of the in- "habitants of the country, and bound by ex- "press stipulation to confirm the possession "and titles of the French and Canadian in- "habitants and other settlers. * * *"

In the case of Hooker v. Los Angeles, already cited, it was contended by the plaintiffs in error that the decision of the state court against the validity of their claim to the rights of riparian owners and to the ownership of alleged percolating waters in lands embraced in one of the ranchos described in the bill herein, which rights were claimed to be derived from a patent of the United States and from confirmed Mexican grants, was a decision against a title, right, privilege or immunity claimed under the constitution, a treaty or statute of the United States, and that

such decision raised a federal question reviewable here. This court, however, said:

> "Obviously, the question as to the title or "right of plaintiffs in error in the land, "and whatever pertained thereto, was "one of state law and of general public "law on which the decision of the state "court was final. *San Francisco v. Scott, "111 U. S. 768; Powder Works v. Davis, "151 U. S. 389.* And the question of the ex-"istence of percolating water was merely a "question of fact".
>
> Hooker v. Los Angeles, 188 U. S. 314, 317.

And the court further held that the effect of the act of Congress of March 3, 1851, was not drawn in question by the decision of the state court against the claim of plaintiffs in error to the rights of riparian owners and to the ownership of alleged percolating waters in their lands, for the reason that the title asserted by them was derived from Mexican and Spanish grants, and, also, that the controversy respecting those claims did not involve the construction of the treaty of Guadalupe Hidalgo, but only the validity of the title of Mexican and Spanish grants prior to the treaty. This court also held, following its decision in the case of Crystal Springs Land and Water Co. v. City of Los Angeles, 177 U. S. 169, that where both parties to a suit claimed under Mexican grants, confirmed and patented

by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, a controversy as to the nature and extent of the rights so granted and confirmed was not one arising under a treaty so as to confer jurisdiction on a federal court.

So, also, we submit, it is true that a controversy as to the nature and extent of the title or rights of the city as the successor of the pueblo in the pueblo lands and whatever appertained thereto, does not present a federal question.

In the case of San Francisco v. Scott, 111 U. S. 768, this court declared that the decision of the state courts of California, upon the question

> "Whether after the conquest * * * "and before the incorporation of the city of "San Francisco, and before the adoption of "constitution of the state of California, a "person exercising the functions of an al- "calde of the pueblo of San Francisco * * "could make a valid grant of pueblo lands,"

presents no federal question, the court saying:

> "That is a question of general public law, "as to which the decisions of the state court "are not reviewable here. This has been "many times decided."

The lands of the appellants never were part of the public domain and the United States never had any property rights therein. Their title to the land and their rights to the waters therein and to the waters of the Los Angeles river were derived from Spain and Mexico, and not from the

United States. No question therefore arises in this case as to what right or title passes under a patent of the United States for the reason that the patents issued by the United States to the predecessors of the appellants were not grants.

"They were simply, 'A record of the ac-
" 'tion of the government upon the title of
" 'the claimant as it existed upon the ac-
" 'quisition of the country'."

Beard v. Federy, 3 Wall. 478, 491.

"In the legislation of Congress, a patent "has a double operation. It is a conveyance "by the government when the government "has any interest to convey, but where it is "issued upon the confirmation of a claim of "a previously existing title it is documentary "evidence, having the dignity of a record, of "the existence of that title, or of such equi-"ties respecting the claim as justify its rec-"ognition and confirmation. The instrument "is not the less efficacious as evidence of pre-"viously existing rights because it also em-"bodies words of release or transfer from the "government."

Langdeau v. Hanes, 21 Wall. 521, 529.

"* * * The United States, in dealing "with parties claiming, under Mexican "grants, lands within the territory ceded "by the treaty of Mexico, never made pre-"tence that it was the owner of them. When, "therefore, guided by the action of the "tribunals, established to pass upon "the validity of these alleged grants, the "government issued a patent, it was in the "nature of a quit-claim—an admission that

"the rightful ownership had never been in "the United States, but had passed at the "time of the cession to the claimant, or to "those under whom he claimed. This prin-"cipal has been more than once clearly an-"nounced in this court."

Adam v. Norris, 103 U. S. 591, 593.

The fact that the United States, in issuing patents to the predecessors of the appellants, under the act of March 3rd, 1851, did not pretend that it was the owner of such lands, is shown by the provisions contained in the act, that patents issued thereunder shall be "conclusive between the "United States and said claimants only, and shall "not affect the interests of third persons." It may be further observed that the act is not drawn in question and made the subject of dispute merely because adverse claims are made to rights claimed thereunder.

"The validity of a statute is not drawn in "question every time rights claimed under "such statute are controverted, nor is the "validity of an authority every time such "authority is disputed."

Cook County v. Calumet & C. Canal & D. Co., 138 U. S. 653;

Blackburn v. Portland Gold Mining Co., 175 U. S. 571;

DeLamar's Nevada Gold Min. Co. v. Nesbitt, 175 U. S. 523.

If it be conceded that the rights of the predecessors of the appellants to their lands, and whatever appertained thereto, were protected by the treaty of Guadalupe Hidalgo, still, no controversy is shown by the bill to exist as to the construction of that treaty, for the reason that was stated by this court in the case of Phillips v. Mound City Land and Water Assn., 124 U. S. 605, namely, that the treaty

> "neither created the rights nor defined them; "their existence was not made to depend on "the constitution, laws or treaties of the "United States. There was nothing done "but to provide that if they did in fact ex- "ist under the Mexican law, or by reason of "the action of the Mexican authorities, they "should be protected. Neither was any pro- "vision made as to the way of determining "their existence. All that was left by im- "plication to the ordinary judicial tribunal. "Any court, whether state or national, hav- "ing jurisdiction of the parties and of the "subject matter of the action, was free to "act in the premises."

The doctrine announced in that case was sustained in California Powder Works v. Davis, 151 U. S. 395, which arose in the state court.

There, the respective parties each claimed under a different confirmed and patented Mexican grant, and the state court had found that one of the grants had been, by forgery, antedated. This court held that the determination of that fact was

within the province of the state tribunals, and that, although such determination limited the effect of the grant and the patent issued thereon, yet no federal question arose.

The appellants claim that the effect of the Spanish and Mexican grants under which they derived title was to vest in them the percolating waters, if any, in the lands granted; but whether this is true or not, depends, not upon the construction of the constitution or a law or treaty of the United States, but, upon the law of Mexico and of California, the construction of which is a matter exclusively for the state courts.

Hooker v. Los Angeles, 188 U. S. 314.

The Act of March 3, 1851, did not purport to apply to incorporeal rights, in the nature of the right claimed by the city, to take and use the waters of the river.

According to the allegations of the bill, the city's claim with regard to the waters of the river and the underground waters in the lands of appellants is not of the right to enter on those lands, but to take the surface water, presumably where the city may have the right to enter, and also to have the subterranean waters continue in their course through appellants' lands, until they reach the surface stream.

Regarding this right in its most enlarged sense, it is strictly incorporeal in its nature, and does not amount to more than a servitude or easement; but, as we shall show further on, the right, being derived under a general law, applying to all pueblos similarly situated in the present state of California, is a natural easement, like that of a riparian proprietor, and does not constitute an interest in land.

All usufructuary rights with regard to water are easements or servitudes.

Washburn on Easements and Servitudes, (4th Ed.) p. 136, marg. p. 73), pp. 144-5, (marg. pp. 80-1), p. 147, (marg. p. 83), pp. 2-3.

All aquatic rights are easements, and not *profits a prendre*.

Idem, p. 3, (marg. p. 4).

Jones on Easements, Sec. 55.

In the last cited section, it is said, with citation from Blackstone and other authorities, that water is not considered as a produce of the soil, like sand or other solid ingredient, nor like vegetation, unless it is confined in a cistern.

Being a moveable, wandering thing, and constantly renewing itself, so that the same drops do not continuously remain at any one place, running water is not the subject of ownership, and

only a usufructuary right can be obtained with respect thereto.

Kidd v. Laird, 15 Cal. 179-180;

Philadelphia v. Spring Garden, 7 Pa. St. 348;

Sec. 737, Jones on Easements.

The right to take coal in another man's land is an easement, but the ownership of the vein of coal itself is a corporeal right.

Washburn on Easements, p. 18, (marg. pp. 10-11), p. 147, (marg. p. 83).

The owner of an easement has neither the general property in nor seisin of the servient land; and from being something impalpable, such easements are classed with incorporeal hereditaments.

Washburn on Easements and Servitudes, 14th Ed. 18 (marg. 10).

The Act of March 3, 1851, contains no language which is susceptible of the meaning endeavored to be attributed to it in the bill of complaint.

The title of the act shows that it is for the purpose of ascertaining and settling private *land* claims.

In the first section, it is declared to be enacted for that purpose.

By section 8, it is provided that each and every person claiming *lands* in California, shall present the same for confirmation.

By section 9, the claimant or the district attorney is given the right to have the decision of the commissioners reviewed in the district court of the district in which the *land* is situated.

Section 13 provides that all *lands*, the claims to which have been finally rejected, and all *lands*, the claims to which shall not have been presented to the commissioners, shall be considered "as a part of the *public domain* of the United States."

By the same section, a patent is directed to be issued for all claims finally confirmed, upon the claimant's presenting to the general land office *a plat of survey of the land*, certified by the surveyor general, whose duty it shall be to cause all private claims which shall be finally confirmed, to be accurately *surveyed and to furnish plats of the same;* and the surveyor general, in the *location of the claims*, is given certain powers.

The same section further provides that, if the title of the claimant to such *lands* shall be contested by any other person, it shall be lawful for such person to present a petition to the district judge for the district in which the *lands* are *situated*, setting forth his title thereto, and the district judge is given authority to grant an injunction to restrain the party, at whose instance the claim to the *lands* has been confirmed, from suing out a patent until the title has been finally decided.

Section 14 contains provisions with regard to the presentation of claims to town lots, farm lots

or pasture lots, held under grant from any corporation or town, to which *lands* have been granted for the establishment of a town by the Spanish or Mexican government, and also with regard to city, town or village lots in cities, towns or villages existing on July 7, 1846, the claims for which are to be presented by the corporate authorities of the town; and in case of the existence of a city, town or village on that date, that fact is declared to be *prima facie* evidence of a grant to such corporation; and where any city, town or village was in existence at the time of passing the act, the claim for the *lands embraced within the limits of the same* is to be made by the corporate authorities of such city, etc.

It will thus be seen that there is not a word used which refers to incorporeal rights, but the act is expressly confined, by its terms, to lands, or corporeal property.

The provisions with regard to surveys and plats, which are essential to the issuance of a patent, are utterly inconsistent with the idea that it was intended that claims to incorporeal rights, (especially where not embracing the right of entry on lands), should be presented; and when the contention is made with regard to underground waters, which, of course, could not, in the nature of things, be interfered with, without entry on the lands, the climax of absurdity is reached.

How could a survey be made of the waters of a stream, which, in the course of years, naturally shifts its course so as to occupy a different channel, or at least occupy a different area of superficial space, in the different years, depending on rainfall and a variety of other circumstances?

How, too, could the limits of the *underground flow* be accurately determined so as to admit of the running of straight lines or angles?

Suppose that a survey of the channel or supposed channel of the river had been made, and the stream had subsequently changed its course and run across other land, not included in the survey; would not the city have lost its right to the river by reason of its not having been confirmed with respect to that land?

Would not the city have been limited by its patent to the land in the survey, and would not its failure to have additional land included therein have operated as a forfeiture, as regards this latter land, as much so as if no claim at all had been presented?

It certainly would not have been proper to include in the survey all lands, within the limits of which the stream could, by any possibility, have flowed in the future; for this might have included the whole country, when we take into consideration the changes in topography that are made by earthquakes, floods and other convulsions of nature.

The argument of *reductio ad absurdum* certainly applies with overwhelming force here.

The declaration of section 13, that all forfeited lands shall become part of the "public domain", is also utterly inconsistent with the inclusion of incorporeal rights, for that term has a special meaning in the land laws of the United States.

> " 'Public domain' is equivalent to 'public
> " 'lands,' and these words have a settled
> "meaning in the legislation of the country.
> "The word 'public lands' are habitually used
> "in our legislation to describe such as are
> "subject to sale or other disposal under gen-
> "eral laws."
>
> Barker v. Harvey, 181 U. S. 490 (45 L. ed. 968).

The language used is not reasonably susceptible of any other interpretation, we submit, than that it was intended that property, *capable of augmenting the area* of the public lands of the United States, should be *added thereto*, and that such property, of itself, should be of a character which would enable the government to devote it to the purposes to which government lands have been appropriated, namely, settlement and cultivation and final disposition on payment of fees or a price estimated according to acreage.

Section 14, too, expressly provides that claims are to be presented by municipalities, succeeding towns to which grants had been made by the former governments of Spain or Mexico, and

they are limited to *lands within the limits* of such municipalities.

The lands of appellants are all, admittedly, outside of the corporate boundaries of the city of Los Angeles, and, therefore, even if water rights were embraced in the term "land", as those involved in this case are not within the limits of the city, the claim therefor could not have been presented under this section.

This court, in several cases, has recognized and assumed that the act did not apply to incorporeal rights; the contention having been made in those cases that the act did not apply to the property under consideration because not tangible real property, and it was conceded, apparently without question or doubt, by both counsel and the court, that if the claim was for an incorporeal right, the act of 1851 did not apply.

We refer to the cases of:

Fremont v. United States, 58 U. S. 442, (15 L. Ed. 241);

Castillero v. United States, 67 U. S. 17, (17 L. Ed. 360);

Barker v. Harvey, 181 U. S. 481, (45 L. Ed. 963).

In the first mentioned case it was declared, as a ground for not considering the question of the sovereign right to mines in lands in California granted by the former government, that the land

commissioners had no jurisdiction of such a question.

In the Castillero case, the proposition of counsel, (who objected to the jurisdiction by the commission, under the act of 1851, to determine a claim to a mine) that the act did not apply to easements or servitudes, was conceded, and the court proceeded to show that the property, of which confirmation was asked in that case, viz., a title in fee simple to the New Almaden mine, being a piece of land embracing a certain superficial area, and extending from and including the surface down to the center of the earth, was a corporeal hereditament, and not a mere easement, and, therefore, that it was within the purview of the act.

In the case of Barker v. Harvey, *supra*, this court impliedly conceded that, had the right, involved in that case, been merely an easement or servitude, it need not have been presented for confirmation, and based their decision upon the proposition that the right was one of permanent and exclusive occupation of land, leaving no beneficial interest in the grantee of the Mexican rancho, in the midst of which the land was located.

In the case of Los Angeles v. Pomeroy, 124 Cal. 597, appellants expressly raised the point, that the City of Los Angeles had forfeited her rights, with respect to the river, by the failure to present a claim therefor under the act of March

3rd, 1851, but the State Supreme Court did not consider the contention of sufficient merit to refer to it in their opinion; and, afterwards, in the petition for rehearing the distinguished counsel for appellants, whose reputation for keen legal discernment and ability is second to none in California, made no reference to the point, apparently abandoning it.

Afterwards, when the case came before this court on writ of error, although the raising of a federal question was vital to maintaining the jurisdiction, the same counsel did not seem to think his former contention of enough weight to merit repetition, so that it was not presented to this court, and the case was dismissed for want of a federal question.

> Hooker v. Los Angeles, 188 U. S. 314 (47 L. ed. 487).

Moreover, if patents for confirmed Spanish or Mexican grants, under the act of March 3, 1851, had the effect of vesting in the patentee only such rights, with respect to waters, whether surface or subterranean, and whether a flowing stream or merely percolating waters, which belonged to such lands under the Spanish and Mexican law, in force at the time of the grants, then it is plain that servitudes and easements with respect to such waters did not have to be presented, for, otherwise, the failure to present claims therefor

for confirmation would have resulted in those rights passing by the patents for the grants.

That such patents vested in the patentee only such water rights as belonged to the grants by virtue of those laws, has been determined by this court in two cases involving the same waters which are in controversy here, that is, the surface and subterranean waters of the same river, though on different lands.

We refer to the cases of:

Crystal Springs Land & Water Co. v. Los Angeles, 177 U. S. 169 (44 L. Ed. 720);

Hooker v. Los Angeles, 188 U. S. 314 (47 L. Ed. 487).

In the first mentioned case, the opinion was one of affirmance, on authorities, by the court, without a discussion of the facts, but, by reference to the record, it will be seen that the appellants had sued in the United States Circuit Court, to quiet the title to waters, which they had developed in their lands and which were claimed by the city of Los Angeles to be a part of the Los Angeles river and owned by that city by virtue of its rights derived under its patent for pueblo lands and by virtue of the laws of Spain and Mexico governing the rights of pueblos to the waters of the streams on which they were located, and two of the patents, referred to in the bill of complaint in the case at bar, for the Ranchos Los Felis and San Rafael,

as well as the patent of the City of Los Angeles for its pueblo lands, were referred to in the bill in the former case, as being the foundation of the title of both parties, and it was claimed that the patents of the two ranchos had the effect of vesting in the appellants title to the underground waters in their lands.

The Circuit Court had dismissed the bill because no Federal question was raised by those allegations, as the questions concerning the rights of appellants were not created by the act of 1851.

The other case, of Hooker v. Los Angeles, involved the title to the surface and subterranean waters of the Los Angeles river in two of the ranchos mentioned in the bill of complaint in the case at bar, viz., the San Rafael and Providencia, and the same contentions were made in that case as in the Crystal Springs Land and Water Company case.

This court, in its opinion, in dismissing the writ of error to the Supreme Court of California, declared that the right of plaintiffs in error, in their land and whatever appertained thereto, was one of state law and of general public law, and did not involve the construction of the act of March 3, 1851; and further said:

> "The patents were in the nature of a quit-
> "claim, and under the act of March 3, 1851
> "(Sec. 15), were 'conclusive between the
> "United States and the said claimants only,
> "and shall not affect the interests of third

"persons.' The validity of that act was not "drawn in question in the state court, and "*as the right or title asserted by plaintiffs in* "*error was derived under Mexican and Span-* "*ish grants*, the decision of the state court on "the claims asserted by plaintiffs in error to "the waters of the river was not against *any* "*title or right claimed under* the constitution, "or any treaty, or *statute* of, or commission "held, or authority exercised, under the con- "stitution. If the title of plaintiffs in error "were protected by the treaty, still the suit "did not arise thereunder, because the con- "troversy in the state court *did not involve* "*the construction of the treaty, but the va-* "*lidity of the title of Mexican and Spanish* "*grants prior to the treaty.*"

The regulation of easements and servitudes and of natural rights in the waters of innavigable bodies, is a matter of state control, and the United States have no constitutional power over it.

Black's Pomeroy on Water Rights, Sec. 31.

The United States, with respect to their public lands in the states, occupy the position of a private owner, excepting that such lands cannot be taxed or their primary disposition interfered with.

Pollard v. Hagan, 3 How. U. S. 223 (11 L. Ed. 565);

Moore v. Small, 17 Cal. 199;

Lux v. Haggin, 69 Cal. 255.

The rights claimed by appellants, with regard to the waters in question, are based on the laws of the state, and not on those of the United States.

They claim a riparian right with respect to the stream, but this, if it existed, would be derived under the common law of riparian rights, which was adopted by the state of California in the general statute of April 13, 1850, declaring that that law should be the rule of decision in the state.

Had the civil law, which was previously in force in California, when the territory belonged to Mexico, been continued, appellants would have had to claim their rights under the latter law.

The Supreme Court of this state has decided in several cases, that, under the civil law of Mexico, the former pueblo of Los Angeles, of which the city is the successor, was vested with the paramount right to take and use all of the waters of the Los Angeles river, both surface and subterranean, which were needed for municipal purposes, and for the use of its inhabitants; and that this right passed to the appellee by its act of incorporation, passed April 4th, 1850 (Stats. 1850, p. 155). [Tr. fols. 37-8.]

Feliz v. Los Angeles, 55 Cal. 73;

Lux v. Haggin, 69 Cal. 328-9;

Vernon Ir. Co. v. Los Angeles, 106 Cal. 237;

Los Angeles v. Pomeroy, 124 Cal. 597.

But the rights claimed by the city, with respect to the waters mentioned in the bill of complaint, being derived under a general law, like riparian rights under the common law, are in the nature of natural easements and do not constitute an interest in land any more than those of riparian owners

"He (riparian proprietor) has no property in the water itself, but a simple usufruct while it passes along."

3 Kents Comm. marg. p. 439.

To the same effect are:

Jones on Easements, Sec. 737;
Hargrave v. Cook, 108 Cal. 72.

The riparian right, though in the nature of an easement, is not one in strictness, but is a natural right, not created by convention or prescription, and is not an interest in land.

Washburn on Easements and Servitudes, (4th ed.) 24 (marg. 16), 316, (marg 215);

Section 725, Jones on Easements.

A decree, quieting the title to one riparian tract against the owner of upper or lower riparian land, would not deprive the latter of his riparian rights, but would extinguish a true easement or servitude.

The city's title to the paramount right to the waters of the Los Angeles river exists under *a general law*, which prevailed in California up to April 13th, 1850, when the common law of England was adopted. (Stats. 1850, p. 219.)

This was the civil law, which provided that pueblos located on streams, should have the preferred right to the use of the waters thereof.

Lux v. Haggin, 69 Cal. pp. 313-334.

The rights of riparian owners were different under that law from what they are under the common law, as enlarged in California (to the extent of conferring the right to use water for irrigation), for, under the Spanish and Mexican regimes, the title to the waters of innavigable streams was vested in the sovereign, and prior appropriation, under prescribed regulations conferred on the appropriator the authority to divert those waters from riparian lands.

Lux v. Haggin, 69 Cal. pp. 313-334.

By the act of April 4th, 1850, (Stats. 1850, p. 155), the civil law, with respect to the right of the pueblo of Los Angeles, was continued in force by the declaration that the city of Los Angeles incorporated by that act, should succeed "to all the rights, claims and powers of the Pueblo de Los Angeles in regard to property."

The law of California, then, with reference to water rights in the Los Angeles river, is the pre-

viously existing civil law of Mexico, and, so far as relates to other water rights in the state, it is the common law, (except, as suggested in Lux v. Haggin, 69 Cal. pp. 323, 337-8, so far as rights had been fixed under the former government by actual appropriation).

The right of the city is in the nature of an enlarged riparian right, and, by it, riparian lands are not entitled to make as great use of the stream as they could under the extended common law of California.

Under the latter law, riparian owners are subject to the right of upper proprietors to take a part of the stream for irrigation, and to consume the whole flow for domestic use; and they cannot, as against lower riparian lands, divert the whole flow for irrigation, but are bound to permit a proportional part of the water to flow down to such lands.

Under the civil law, this riparian right was further limited by the requirement that all private owners should abstain from diverting the waters of streams, on which pueblos were founded, and by the power of those pueblos to divert those waters for the use of the municipality and its inhabitants.

We, therefore, contend that the construction to be placed upon the patents issued by the United States, under the act of March 3, 1851, to lands bordering on the Los Angeles river, in respect

to the rights of the patentees in the waters of that stream, must be left to the local law of the state of California. The local law of that state upon this subject is the law of Mexico as it existed at the time of the change of flags, except in so far as the same has been repealed or modified by the legislature of the state.

The disclaimers contained in the answer effectually remove any possible ground of Federal jurisdiction.

The appellants allege that they are the owners in fee simple, under Spanish and Mexican grants, of lands riparian to the river and assert ownership of riparian rights in the Los Angeles river and of all the waters oozing or percolating in their lands. They charge that the city claims to be the owner of all of the waters of the Los Angeles river, and its tributaries, and of all of the waters percolating and existing in their lands; that these claims are based in part on the treaty of Guadalupe Hidalgo and the act of Congress of March 3, 1851, and in part upon certain acts of the legislature and charters of the city, and that said acts and charters, in purporting to vest in the city the absolute ownership of the waters of the river, have the effect of depriving appellants of their property without due process of law and of impairing the obligation of the contract

created by the patents for the Spanish and Mexican grants in which their lands are located. [Tr. fols. 41-48.]

The answer of defendant denies that it rests its claim to the waters of the Los Angeles river, or to the waters in the lands of appellants upon the acts of the legislature or the charters mentioned in the bill, except in so far as these acts and charters may have had the effect of vesting in the city, the interest, if any, that the state of California had in those waters; but, on the contrary, the defendant disclaims having acquired, under any of said acts or charters, any waters or rights which were ever vested in the apellants or their predecessors. [Tr. fols. 70-80.]

This question was expressly decided by this court in the above mentioned case of Crystal Springs Land & Water Co. v. Los Angeles, 177 U. S. 160 (44 L. ed. 720), in which the same acts and charters were attacked as depriving the complainants of their rights with respect to the waters of the Los Angeles river without due process of law, and as impairing the obligation of the contracts created by the patents for the Ranchos Los Felis and San Rafael, referred to in the bill in the case at bar, and the answer in the former case made the same disclaimers as are made in the answer in the present case; and this court held that the answer was sufficient to

remove the federal question and oust th
Court of jurisdiction, if any was made by

In that case, too, appellants made the
jections to the sufficiency of the disclaime
raised in the brief of appellants on the
appeal.

The decision in the last mentioned c
followed and approved in the case of Bo
Mining Co. v. Montana Ore Co., *supra.*

We respectfully submit that the Circu
properly dismissed the bill for want of
tion and that the decree should be affirme

W. B. MATHEW
Solicitor for Ap

HENRY T. LEE,
J. R. SCOTT,
Of Counsel.

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